NO. 82-1235

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1982

CHARLES E. LUNA,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioner was denied due process of law because Rule 204, Texas Rules of Post Trial and Appellate Procedure in Criminal Cases, permitted submission and disposition of his appeal by a court of appeals without notification to his counsel.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the petition for writ of certiorari submits this Brief in Opposition.

OPINION BELOW

On November 12, 1981, the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas issued a per curiam opinion affirming Petitioner's conviction. (Appendix A-2 to the petition). The Texas Court of Criminal Appeals denied Petitioner's petition

for discretionary review without a written opinion on October 13, 1982 (Appendix A-1 to the petition), and overruled his motion for rehearing on November 24, 1982. (*Id.*)

JURISDICTION

Petitioner correctly seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner's claim is based on the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On July 13, 1979, Petitioner was convicted of the felony offense of commercial bribery after a jury trial on his plea of guilty in the 203rd District Court of Dallas County, Texas. He was represented during his trial by a retained attorney, Robert Hinton. Petitioner was sentenced on August 17, 1979, to five years imprisonment in the Texas Department of Corrections and gave notice of appeal on the same date.

On January 10, 1980, Petitioner retained Fred Head as counsel on appeal. After the trial court was notified of this change, the court sent Mr. Head a letter informing him that notice of appeal had been given and that no arrangements had been made concerning preparation of the statement of facts and transcript for appeal. In this letter, the trial court also arranged a setting on February 28, 1980, for a hearing which Mr. Head desired, but made clear the intention of the court that the appeal be processed unless an extension was granted by the Court of Criminal Appeals. At the February 28 hearing, Mr. Head agreed to submit a formal motion to reopen to be heard on April 2, 1980, and to file a motion

for extension of time in the Court of Criminal Appeals. The trial court sent Mr. Head a letter confirming the agreement on March 4, 1980. Subsequently, the record fails to reflect that Mr. Head filed either of these motions or that he appeared at the April 2 setting.

On June 5, 1980, the trial court ordered that the record on appeal be transmitted to the Court of Criminal Appeals. The Court of Criminal Appeals, however, returned the record because while the record had been approved on February 21, 1980, the record did not indicate that the parties were notified of the approval. The parties were then notified on July 10, 1980.

In November, 1980, Texas amended its constitution to add criminal jurisdiction to its intermediate appellate courts. This amendment took effect on September 1, 1981. On November 4, 1981, the trial court sent the record on appeal to the Court of Appeals for the Fifth Supreme Judicial District in Dallas in accordance with the September 1, 1981, amendment. The Court of Appeals affirmed Petitioner's conviction on November 12, 1981. After Mr. Head learned of the Dallas court's decision he filed numerous requests for rehearing and other relief. On December 11, 1981, almost two years after Mr. Head was notified that no statement of facts had been ordered, he made his first effort to secure a statement of facts from the court reporter.

Although Petitioner filed a petition for discretionary review in the Court of Criminal Appeals, he did not claim that he was denied due process of law by operation of the Texas statute until his motion for rehearing of the denial of that petition.

SUMMARY OF ARGUMENT

There are no special and important reasons to consider the issue presented.

Petitioner has not properly presented the issue raised herein to the Texas Court of Criminal Appeals; therefore, this Court is without jurisdiction to grant the writ of certiorari.

The rule of appellate procedure of which Petitioner complains did not deny him due process of law.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

S.Ct.R. 17 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reasons in this case, and none exists.

II.

THIS COURT IS WITHOUT JURISDICTION TO CONSIDER PETITIONER'S CLAIM BECAUSE IT WAS NOT PROPERLY PRESENTED TO THE TEXAS COURT OF CRIMINAL APPEALS.

Although Petitioner stated in his petition for discretionary review before the Texas Court of Criminal Appeals that the Fifth Court of Appeals failed to notify his counsel of the submission of his appeal, he did not argue that this failure denied him due process of law until he filed a motion for rehearing of the denial of his petition. "The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing comes too late, unless the court actually entertains the question and decides it." *Herndon v. Georgia*, 295 U.S. 441, 443 (1935). *See also, Bloeth v. New York*, 369 U.S 133 (1962). Since Peti-

tioner complains of a procedure used by the intermediate appellate court, a motion for rehearing in the highest appellate court was clearly *not* Petitioner's first opportunity to raise his claim. Petitioner could and should have raised his claim in the first pleading filed in the Texas Court of Criminal Appeals, his petition for discretionary review, rather than in his motion for rehearing filed in that court. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the state proceedings, but that it be raised at the proper point. *Beck v. Washington*, 369 U.S. 541, 550 (1962). Since Petitioner's claim was not raised until motion for rehearing in the Court of Criminal Appeals and since the Court of Criminal Appeals denied rehearing without explanatory comment, this Court is without jurisdiction to consider Petitioner's claim. *Wilson v. Aiken Industries, Inc.*, 439 U.S. 877, 879 (1978).

III.

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY OPERATION OF RULE 204, TEXAS RULES OF POST TRIAL AND APPELLATE PROCEDURE IN CRIMINAL CASES.

Petitioner contends that his attorney had no opportunity to obtain and submit a statement of facts, to prepare and submit a brief, or to argue orally before the court because Rule 204, Texas Rules of Post Trial and Appellate Procedure in Criminal Cases, provides that failure of counsel to receive notice of submission will not necessarily defeat submission of the case. The record reflects, however, that Petitioner's counsel had adequate and fair notice that the appeal was being processed and had ample opportunity to obtain a statement of facts and prepare and submit a brief.

Petitioner's counsel, Mr. Fred Head, was first notified on February 12, 1980, that no arrangements had been made to obtain a statement of facts and that the trial court intended that the appeal be processed promptly unless Mr. Head obtained an extension of time from the Court of Criminal Appeals to obtain a statement of facts.[1] Mr. Head made no effort to order a statement of fact from the court reporter or to obtain an extension of time. Mr. Head again received notice that the appeal was being processed when he received notice of approval of the record on appeal on July 10, 1980. Under the rules then in effect, Mr. Head had thirty days after notice of approval of the record was mailed to file a brief. Tex. Code Crim. Proc. Ann. art. 40.09(9). He failed to file a brief or make any other effort to perfect Petitioner's appeal even though he had ample opportunity to do so. The failure of Petitioner's case to be presented on appeal[2] occurred not because Texas rules of appellate procedure failed to give the notice required by due process, but because Petitioner's counsel failed to make use of the orderly procedure provided for by Texas law. The contrast, both substantially and procedurally, to *Armstrong v. Manzo*, 380 U.S. 545 (1965), is obvious. It would be more appropriate for Petitioner to file a state writ of habeas corpus pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 alleging ineffective assistance of counsel on appeal to obtain an out-of-time appeal rather than challenge Rule 204 as a denial of due process.

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1. Tex. Code Crim. Proc. Ann. art. 40.09(2) provides that the party who desires to include a statement of facts in the record on appeal has the responsibility of obtaining such transcription from the court reporter.

2. Since Petitioner pleaded guilty, it is difficult to imagine that basis for the appeal he has sought. He suggests he might have shown that he "was denied the effective assistance of counsel at his trial." (Petition at 12). Although this ground might provide a basis for post-conviction relief, it is difficult to perceive how a guilty plea transcript might reflect such incompetence.

(footnote continued on following page)

CONCLUSION

For the above reasons, Respondent respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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(footnote continued from previous page)

In the Texas Court of Criminal Appeals, Petitioner stated that his case should be reviewed because that court had never construed the statute under which he was convicted and because the judge who presided over the punishment phase of his trial was not the same judge who had heard his guilty plea. He raised no question of the validity or construction of the statute, however; and it was a jury, not the judge, that denied his application for probation and assessed punishment at five years confinement.